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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: OCT 0 6 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Mari Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a quantitative analyst at [redacted]. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on October 21, 2009. In an accompanying letter, counsel stated:

> [The petitioner's] past, ongoing and prospective leadership role as a mechanical engineer specializing in solving a variety of problems in healthcare technology and finance, unquestionably serves the U.S. national interest.

. . . [The petitioner] has brought his substantial expertise to bear on the research and development of innovative, groundbreaking, technologies and computer software that power, sustain and enhance two main areas of industry: healthcare technology and finance. As a research assistant at the [redacted] the petitioner] developed a telerehabilitation system in which patients' hand movements could be analyzed by strapping inertial sensors to their hands. . . . [The petitioner's] research reports on this project were published in peer-reviewed journals and were widely cited in the scientific literature. [The petitioner] then played a critical role in the development of a wireless health monitoring sensor network at [redacted] . . .

[The petitioner] has also applied his mathematical modeling and technology skills to finance. At State Street Corporation, he has developed the risk model for the securities lending division by using statistical and optimization techniques. . . .

At [redacted] multibillion dollar endowment, [the petitioner] developed an algorithm to estimate hedge fund liquidity. . . .

[The petitioner] currently serves as a Vice President and [redacted], where he is identifying ways to determine the best investment management strategies by using mathematical and statistical techniques. . . .

[The petitioner's] leadership role at two prestigious US institutions and two important US companies, all with global presence in their respective spheres, have directly contributed to the development of original technology. . . . [The petitioner] now continues to offer solutions to technological challenges that face the financial services industry as it continues to rebound from its current downturn, both in the United States and throughout the world. The impact of [the petitioner's] work as a mechanical engineer is thus clearly national and indeed international in scope.

. . . Senior business executives, researchers, academicians and engineers in the field of technology development confirm [the petitioner's] distinguished reputation as a mechanical engineer whose work has both advanced his specialty field and opened new lines of opportunity for professionals in other related areas of specialization. Please note that [the petitioner's] employment within industry has made his work largely subject to corporate proprietary regulations. Nonetheless, the impact of his work in the financial services industry, and more generally in the fields of mechanical engineering and mathematical modeling is indisputably greater than that of other exceptionally productive professionals of comparable experience.

The petitioner submitted six witness letters with the initial filing of the petition. [redacted] associate professor and director of the [redacted]

> I served as [the petitioner's] direct supervisor when he worked in the [redacted] . . .
>
> His obvious technical talents coupled with his capacity for independent work and his maturity made [the petitioner] an extremely valuable addition to my research team. One hallmark of his technical research credentials is the unique combination of innovation and theoretical rigor that he combines with practical real-world implementations of these concepts. . . .
>
> [H]e first developed a MATLAB to Direct-X interface in order to allow direct control of a Force Feedback wheel – which he has not packaged with documentation and posted on MATLAB Central (http://matlabcentral.com) for use by the research-community at large. Additionally, he utilized a virtual-human-modeling package, allowing for playback of the patient's rehabilitation exercises via the virtual avatar to a therapist. Finally, worthy of mention are the various data acquisition, signal processing and motion control applications that he developed to help support the lab efforts.

[redacted]

> I am familiar with [the petitioner's] work since 2004, when we collaborated on control algorithms for wireless sensor networks at [redacted] This multi-disciplinary, cutting edge research involved mathematical modeling of sensor networks and use of numerical optimization techniques to optimally control such networks. [The petitioner] used elegant mathematical model approximation methods. We were able to solve the control problem . . . due to the mathematical technique implemented by [the petitioner]. . . . The method identified by [the petitioner] is capable of providing the desired output within the computational and power constraints of typical sensor networks.
>
> . . . Without doubt, I consider [the petitioner] to be an outstanding researcher and professional in the field of mathematical modeling and its multi-disciplinary practical applications.

After working for about a year at [redacted], the petitioner shifted his career focus to the financial industry. [redacted] vice president and senior quantitative analyst at [redacted] stated:

[The petitioner] and I have never collaborated and we have met only in the context of professional meetings, but I am familiar with his work on risk modeling for the securities lending business of [redacted]. I have also briefly looked at his work on hedge fund liquidity for the [redacted]. . .

I have been following [the petitioner's] work on financial risk modeling for [redacted] since 2008. . . . I am responsible for the audit and internal review of models deployed by [redacted]. I have examined various models developed by the securities lending team, including the work of [the petitioner]. In particular, [the petitioner] was responsible for developing optimization routines for measuring risk in securities lending transactions, and implementing those routines in the [redacted]. My opinion was that the routines and code written by [the petitioner] were both of very high quality.

Regarding the petitioner's subsequent work at Harvard Management Company, [redacted] stated: "I believe that models of liquidity risk of hedge funds such as the one developed by [the petitioner] are timely and welcomed." At the same time, however, [redacted] acknowledged that he had "not conducted a formal review of [the petitioner's] model."

[redacted]

I have known [the petitioner] since 2005 when he was hired in my group based on his excellent research experience with mathematical modeling and optimization in engineering. Without any background in financial modeling, he learned the complex business of Securities Finance and our risk and analytics systems, and proposed better ways to model in just a few months. . . . He went on to develop technology interfaces which would allow the use of models developed in modeling software to be seamlessly used in a large technology infrastructure. This technology interface proved to be very robust and stood the test of time. Overall, his work helped us in modeling and reporting financial risk in a very efficient manner.

The scope of his work is by no means limited to State Street Corporation. Research has shown that securities lending facilitates efficiency in securities markets. . . . The risk models, developed by [the petitioner], helped in capturing the risk in the securities lending business in a manner in which a company can maximize its market efficiency function without undue risk to the company. I believe the quality of his solutions was excellent and certainly worth presentation at professional conferences or publication at peer-reviewed journals. Unfortunately this research can not be published in open literature due to its proprietary nature.

[redacted]

> [The petitioner] was invited to join our risk group in 2008 based on his strong mathematical modeling skills and achievements in the area of technology development. . . . He proposed and implemented a number of automation tools which can help risk analysts automate manual and routine work. Because of these tools our analysts could save substantial amounts of time, thus affording them the opportunity for more productive analysis. . . .
>
> [The petitioner's] research specialty in the domain of financial industry was in the design and validation of in house or vendor supplied risk systems. . . . His work on modeling liquidity of alternative asset classes was a substantial breakthrough in the area of liquidity risk management. The model he developed remains a very useful tool in conducting scenario analysis related to the understanding of liquidity as well as asset liability management problems typically faced by almost all the university endowments. . . .
>
> [The petitioner's] research in financial risk management is unique, timely and significant as institutional investors face unprecedented challenges in optimizing their investment portfolios in the face of current economic upheaval. [The petitioner's] experience in other areas of industry, notably robotics and technology, affords him tremendous perspective in designing multidisciplinary solutions to these financial management challenges.
>
> [The petitioner] has tangibly influenced his peers in the design of mathematical models for liquidity risk, and he will certainly continue his already exceptional track record of practical contributions to our discipline.

[redacted] chief operating officer of [redacted], provided a much briefer (four-sentence) letter, stating that the petitioner "distinguished himself by his creative thinking in modeling and his ability to analyze and provide technical solutions to complex problems."

The petitioner submitted copies of several journal articles and conference presentation abstracts relating to his work with robotics and medical technology. The petitioner also documented several citations of the published works.

In a request for evidence January 20, 2010, the director instructed the petitioner to submit evidence to show that his financial work meets the guidelines published in *Matter of New York State Dept. of Transportation*. The director also stated:

> It appears that you work as a quantitative analyst. However, you are using your work as a mechanical engineer to support your application for a National Interest Waiver. Your work as a mechanical engineer is unrelated to your work as a quantitative analyst. Therefore, the evidence of citations, scholarly articles and support letters related to mechanical engineering will not be considered.

In response, counsel stated: "We wholeheartedly disagree" with the above assertion. Counsel asked the director to "consider the enclosed testimony from leading representatives in the healthcare and financial industries, and academia, who explain the important connection that exists between these seemingly distinct disciplines." The "enclosed testimony" consisted of three letters.

[redacted] stated:

> At the nexus of institutional finance and optimization science, few are positioned to develop innovative tools to address investment risk management with the same sophistication as [the petitioner]. His research publications in the fields of mechanical engineering and optimization earned him the respect of his academic peers and sparked interest in the financial industry, and led to his sequential recruitment at three leading financial institutions. . . .
>
> His training prepares him extraordinarily to contribute significantly in financial risk management in large institutions. His field of expertise requires state-of-the-art mathematical and statistical analytics applicable for a variety of new and different scenarios.

As quoted above, [redacted] did not explain how the petitioner's two fields are related; he simply asserted that they are related.

Prior witness [redacted] provided a second letter, and stated:

> Technology development is increasingly becoming an interdisciplinary field that attracts scientists who are able to effectively translate and implement their research efforts into real-world applications. A wealth of experience in the area of optimization and mechanical engineering lends [the petitioner] an advantage when attempting to conceptualize and implement advancements in technological developments in the financial industry, and further distinguishes him from his colleagues.

[redacted] claimed that the petitioner's financial work uses "the same concepts that he artfully manipulated in the realm of mechanical engineering," but he did not identify those "concepts."

[redacted]

> I personally hired [the petitioner] based on his modeling experience across various fields, and particularly because of his ability to apply his engineering methodology to finance. Additionally, his record of publication in peer-reviewed scientific journals

was a significant factor in his selection, as it is my intention to publish in the academic literature, and I sought a candidate who could provide leadership in this regard.

[The petitioner's] work involves . . . his investigation of new methodologies to identify skilled managers and create tools that team members can use while recommending managers. One of the first tools he developed used numerical optimization techniques based directly on his engineering training. He has also investigated academic literature to understand how scientists have used modeling techniques to identify good managers. While efficient market theory says that either skilled managers cannot be identified, or managers do not have skills at all, [the petitioner's] preliminary results show that neither of these assumptions are entirely true. He is currently modeling manager skills using a combination of engineering and finance knowledge. With his unique interdisciplinary approach, he has identified some of the shortcomings of current performance measures used to evaluate managers' investment performance. I strongly believe this groundbreaking study will enhance our investment advice to our U.S. clients. In addition, we anticipate releasing a summary of our findings and expect that it will have a significant impact on modeling methodology and investment advisory practice across the entire financial industry. This new methodology also stands to assist individual clients in protecting their investments.

In his own statement, the petitioner discussed "the emerging multidisciplinary field called Financial Engineering," and stated that his "research work on engineering optimization" has enabled him to make contributions not only in mechanical engineering, "but also to the nation's economy through the finance context." The petitioner asserted that mechanical engineering and financial engineering use "the same optimization techniques for making investment decisions." The petitioner then quoted from several witness letters to support the proposition that he has "a consistent record of achievement irrespective of the specific area of research with different employers that justifies projected future benefits." The petitioner claimed that the labor certification process cannot take his special attributes into account, and that "failure to consider these factors could result in a denial of a labor certification." About five weeks after the petitioner wrote these words, the Department of Labor approved a labor certification application on his behalf. The actual approval of a labor certification nullifies any hypothetical claims about the possible denial thereof.

The petitioner's two career paths have both involved computer science and complex mathematical computations in some way, but this overlap does not compel the conclusion that graduate-level medical technology research relates directly to a career in the financial sector, or that the petitioner is better prepared for his intended work than an individual who holds academic degrees that relate more directly to the financial sector. Whatever the petitioner's past successes with medical robotics and related technologies, he offers no prospective benefit to the United States in that area because he is now a quantitative analyst for the financial industry.

The AAO acknowledges [redacted] assertion that the petitioner plans to publish his findings regarding manager skills, but there is no evidence that the petitioner has already published anything in the financial services field. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). If the petitioner has not published in his current field as of the filing date, little weight attaches to tentative plans to publish at some undefined future time. Furthermore, citation of the petitioner's prior work in a very different area of endeavor does not imply or suggest that the petitioner's financial publications will have similar influence.

The director denied the petition on June 30, 2010. The director acknowledged the intrinsic merit of the petitioner's occupation, and also stated: "An alien seeking [a national interest waiver] must present a national benefit so great as to outweigh the national interest inherent in the labor certification process. The petitioner's national benefit meets the requirements of this section." The director then, however, offered the contradictory finding that the petitioner's work lacks national scope because "the benefit of the petitioner's services will be limited [to] [redacted]" The director did not explain how the petitioner's work lacks national scope but offers "national benefit."

On appeal, counsel argues that "[n]one of the services provided by the petitioner can be characterized as being local." Counsel found the director's conflicting findings to be "paradoxical" and "deeply troubling." The AAO agrees that the director's decision contains self-contradictory elements, but does not share counsel's conclusion as to where the error lies in that decision.

Asserting the national scope of the petitioner's work, counsel acknowledges that much of the petitioner's work product is proprietary, but states that the petitioner "would gladly develop proprietary models for other employers" if his immigration status permitted him to do so. The AAO rejects the argument that USCIS must first grant the waiver in order to create the conditions that would then justify that waiver. The AAO has already quoted the USCIS regulation at 8 C.F.R. § 103.2(b)(1), stating that the petitioner must be eligible at the time of filing. A petitioner cannot become eligible under a new set of facts at a future date. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Counsel notes "the national presence of [redacted] which "is a nationally recognized financial institution" with thousands of employees, "costumers [*sic*] in all 50 states," and "assets . . . valued at over [redacted] It does not follow that the duties of every [redacted] employee have national scope. The record does not establish the extent of the petitioner's influence over [redacted] total national holdings. The petitioner's work may be national in scope, but the record contains insufficient evidence to confirm that conclusion.

[redacted] official to submit a statement for the record, protested "the misperception of [the petitioner's] work as being exclusively beneficial to our company" and urged consideration of "the national implications of his contributions to investment manager performance and investment advisory services." [redacted] however, offered little information about what those

contributions are. He stated that the petitioner's "preliminary results" contradict conventional wisdom in the field, but he did not indicate that the petitioner's work had produced proven or viable solutions at the time of filing in October 2009.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). An alien seeking the waiver must show "a past history of demonstrable achievement with some degree of influence on the field as a whole." *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 219 n.6.

The AAO notes that [redacted] filed a Form I-140 petition on the alien's behalf, with an approved labor certification, on September 27, 2010. The director approved that petition on October 5, 2010. The approved petition, with a priority date of April 1, 2010, classified the beneficiary as a member of the professions holding an advanced degree. The Department of Labor approved the labor certification on June 29, 2010, a month before the alien filed the present appeal on August 2, 2010.

On the ETA Form 9089 labor certification application, [redacted] listed the alien's current job duties with that company. The listed duties did not include analysis of "investment manager performance" or publication of the results of such analysis. There is, therefore, reason to question how central such analysis is to the alien's actual and intended duties at [redacted] In any event, the alien now holds the classification sought, and his employer has met the job offer/labor certification requirement that the alien sought to waive.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.